

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ORDER DISMISSING CLAIMS,
DENYING PENDING MOTIONS,
DIRECTING THE CLERK TO MODIFY THE DOCKET,
CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH,
AND NOTIFYING PLAINTIFF OF APPELLATE FILING FEE

On August 18, 2015, Plaintiff Cletus John Robert Franklin (“Franklin”), who is currently an inmate at the Whiteville Correctional Facility (“WCF”) in Whiteville, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 accompanied by a motion to proceed *in forma pauperis* regarding allegations at the West Tennessee State Penitentiary (“WTSP”) in Henning, Tennessee. (ECF Nos. 1 & 2). In an order issued August 19, 2015, the Court granted leave to proceed *in forma pauperis* and assessed the civil filing fee pursuant to the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. §§ 1915(a)-(b). (ECF No. 4) The Clerk shall record the defendants as WTSP Sergeant and Disciplinary Hearing Officer Dustin Chumley, WTSP Warden James Holloway, and Tennessee Department of Correction (“TDOC”) Commissioner Derrick Schofield. All defendants are sued in their individual and official capacity. On November 30, Franklin filed a Motion to Amend his Complaint. (ECF No. 5.) Because the case has not yet

been screened, Franklin is entitled to amend his complaint without leave of the Court. Franklin's Motion to Amend is GRANTED. The Clerk is DIRECTED to add the following defendants being sued in their individual and official capacity: WTSP Sergeant and Disciplinary Hearing Officer Justin Lease, Disciplinary Board Corrections Clerical Officer Anne Ogden, Disciplinary Board Corrections Clerical Officer C. DeWalt, and Reporting Official Food Steward Jacqueline Harmon.

I. The Complaint and Amended Complaint

On June 3, 2015, Harmon issued a disciplinary against Franklin stating that she viewed VICON Camera P30887 and saw Franklin open a cooler door with a boat (or vat) paddle causing destruction of state property. (Amended Compl. at 2, ECF No. 6.) On June 4, 2015 Franklin was called to the Disciplinary Board where Defendant Chumley said he saw Franklin damage the door in the video, then offered Franklin five days punitive segregation and a four dollar fine. (*Id.*) Franklin accepted the punishments, continued to work in the kitchen and agreed to waive his due process rights. (*Id.*) On June 17, 2015, Franklin received a copy of the Agreement to Plead Guilty and Waiver of Disciplinary Hearing and Due Process Rights which reflected the aforementioned stated punishments. (*Id.* at 3.)

On July 7, 2015, Defendants Chumley and Ogden came to the kitchen and told Franklin that he owed \$2000 and was terminated from his kitchen job. (*Id.*) Defendants did this while attempting to intimidate Franklin by balling up his fists and screaming at Franklin. (*Id.*) Franklin learned later that day that Defendants Chumley and Ogden had "illegally added" \$1,885 in restitution and job termination. (*Id.*) Franklin immediately filed appeals to Defendants Holloway and Schofield. (*Id.*) Defendant Holloway denied the appeal and Defendant Schofield did not respond to Franklin. (*Id.*) Franklin then filed a grievance against Chumley, but it was

returned as inappropriate. (*Id.*) On July 13, 2015, Franklin filed a formal request for administrative review to Defendant Holloway which was denied. (*Id.*)

After requesting documents under Tennessee's Public Records Act, Franklin was given copies of his Agreement to Plead Guilty and Waiver of Disciplinary Hearing and Due Process Right, but, Franklin contends, they have been altered to include the restitution and job termination. (*Id.*) In response, Franklin filed a formal request for internal investigation and dismissal of disciplinary convictions to defendants, but he has not heard back from anyone at WTSP or TDOC. (*Id.*)

On October 10, 2015, Franklin received a response from TDOC Staff Attorney Torrey Grimes, who is not a party to this complaint; however, there was no mention of the illegal restitution or job termination on the electronic Tennessee Offender Management Identification System ("e-TOMIS") which is required by TDOC policy. (*Id.* at 4.)

Franklin contends that Defendant Harmon issued a disciplinary in retaliation for Franklin speaking with internal affairs about her bringing contraband to her "inmate lover" Daniel McFarland, for which she was subsequently terminated. (*Id.*) Franklin alleges that Defendants Chumley and Ogden altered official state documents, for a charge that Franklin did not commit, and caused Franklin to plead guilty for punishments that he would not have agreed to had he known the sanctions. (*Id.*) Franklin further alleges that Defendants had several opportunities to remedy this situation, but did nothing. (*Id.*)

Franklin adds that Defendant Chumley and Ogden fraudulently induced him to waive his due process rights, that Defendant Harmon issued a false disciplinary making false statements violating Franklin's due process rights, and that Defendants Lease DeWalt, Holloway and Schofield's refusal to correct "this injustice" also violated his due process rights. (*Id.* at 5.)

Franklin seeks an injunction ordering Defendants to vacate the restitution charge as well as award compensatory and punitive damages. (*Id.* at 6.)

II. Analysis

A. Screening and Standard

The Court is required to screen prisoner complaints and to dismiss any complaint, or any portion thereof, if the complaint—

- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b); see also 28 U.S.C. § 1915(e)(2)(B).

In assessing whether the complaint in this case states a claim on which relief may be granted, the court applies standards under Federal Rule of Civil Procedure 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). “Accepting all well-pleaded allegations in the complaint as true, the Court ‘consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.’” *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681) (alteration in original). “[P]leadings that . . . are no more than conclusions . . . are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the

requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”).

“A complaint can be frivolous either factually or legally. Any complaint that is legally frivolous would *ipso facto* fail to state a claim upon which relief can be granted.” *Hill*, 630 F.3d at 470 (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 328-29 (1989)).

Whether a complaint is factually frivolous under §§ 1915A(b)(1) and 1915(e)(2)(B)(i) is a separate issue from whether it fails to state a claim for relief. Statutes allowing a complaint to be dismissed as frivolous give “judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *Neitzke*, 490 U.S. at 327, 109 S. Ct. 1827 (interpreting 28 U.S.C. § 1915). Unlike a dismissal for failure to state a claim, where a judge must accept all factual allegations as true, *Iqbal*, 129 S. Ct. at 1949-50, a judge does not have to accept “fantastic or delusional” factual allegations as true in prisoner complaints that are reviewed for frivolousness. *Neitzke*, 490 U.S. at 327-28, 109 S. Ct. 1827.

Id. at 471.

“*Pro se* complaints are to be held ‘to less stringent standards than formal pleadings drafted by lawyers,’ and should therefore be liberally construed.” *Williams*, 631 F.3d at 383 (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). *Pro se* litigants and prisoners are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, No. 09-2259, 2011 WL 285251, at *5 (6th Cir. Jan. 31, 2011) (affirming dismissal of *pro se* complaint for failure to comply with “unique pleading requirements” and stating “a court cannot ‘create a claim which [a plaintiff] has not spelled out in his pleading’”) (quoting *Clark v. Nat’l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975)) (alteration in original); *Payne v. Sec’y of Treas.*, 73 F. App’x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, “[n]either this court nor the district court is required to create Payne’s

claim for her”); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) (“District judges have no obligation to act as counsel or paralegal to *pro se* litigants.”); *Young Bok Song v. Gipson*, 423 F. App’x 506, 510 (6th Cir. 2011) (“[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come before it, that responsibility does not encompass advising litigants as to what legal theories they should pursue.”).

B. § 1983 Claim

Franklin filed his typed complaint pursuant to actions under 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) a deprivation of rights secured by the “Constitution and laws” of the United States (2) committed by a defendant acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

1. *Claims against the State of Tennessee*

“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). Franklin’s claims against Defendants, who are all TDOC employees, in their official capacities are brought against the State of Tennessee.

Franklin has no valid claim against the TDOC Defendants in their official capacities. The Eleventh Amendment to the United States Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The Eleventh Amendment has been construed to prohibit citizens from suing their own states in federal court. *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Employees of Dep’t of Pub. Health & Welfare v. Mo. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973); *see also Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253-54 (2011) (“A State may waive its sovereign immunity at its pleasure, and in some circumstances Congress may abrogate it by appropriate legislation. But absent waiver or valid abrogation, federal courts may not entertain a private person’s suit against a State.” (citations omitted)). By its terms, the Eleventh Amendment bars all suits, regardless of the relief sought. *Pennhurst*, 465 U.S. at 100-01. Tennessee has not waived its sovereign immunity. Tenn. Code. Ann. § 20-13-102(a). Moreover, a state is not a person within the meaning of 42 U.S.C. § 1983. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 617 (2002); *Will*, 491 U.S. at 71.

2. *Claims for Due Process violations on Disciplinary and Deprivation of Property*

A Fourteenth Amendment procedural due process claim depends upon the existence of a constitutionally cognizable liberty or property interest with which the state has interfered. *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993). A prison disciplinary proceeding does not give rise to a protected liberty interest unless the restrictions imposed constitute an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Confinement to punitive segregation, the loss of package privileges, fines, and restitution do not constitute an atypical and significant hardship in the context of prison life. *See Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986). Alleged violations of TDOC policy are not actionable under 1983. See *Storm v. Swiger*, No. 4:07 CV 2387, 2007 WL 3171491, at *3 (N.D. Ohio Oct. 29, 2007) (citing *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993), *overruled in part on other grounds by Thompson v. Keohane*, 516 U.S. 99, 111 (1995)).

Tennessee law provides for judicial review of prison disciplinary proceedings.¹ *See Tenn. Code Ann. §§ 27-8-101, 102; Bishop v. Conley*, 894 S.W.2d 294, 296 (Tenn. Crim. App. 1994). After exhausting state court remedies, a prisoner may seek federal habeas relief to restore good-time credits. *See Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). Franklin fails to allege any attempts to exhaust his state court remedies.

A prisoner who succeeds in overturning his disciplinary conviction can bring a § 1983 due process claim. *See Edwards*, 520 U.S. at 648. *See also Schilling v. White*, 58 F.3d 1081, 1087 (6th Cir. 1995) (“Even a prisoner who has fully exhausted available state remedies has no

¹The proper vehicle for challenging a disciplinary action is a petition for a common law writ of certiorari, and the petition must be filed within sixty (60) days of the challenged action. *Rhoden v. State Dep’t of Corr.*, citing *Bishop v. Conley*, 894 S.W.2d 294 (Tenn. Crim. App. 1994).

cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.”).

Further, Franklin’s claim against having to pay restitution can also be viewed as a deprivation of property claim. Claims for deprivation of property are not actionable under § 1983 if adequate state remedies are available to redress the deprivation. *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981), partially overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985); *Brooks v. Dutton*, 751 F.2d 197 (6th Cir. 1985). “[T]he State of Tennessee does provide an adequate post-deprivation remedy for takings of property.” *McMillan v. Fielding*, 136 F. App’x 818, 820 (6th Cir. 2005); *see also Brooks v. Dutton*, 751 F.2d 197, 199 (6th Cir. 1985). Plaintiff is entitled to file a claim with the Tennessee Claims Commission or to sue the Defendants, or any other responsible person, in state court.

3. *Claims for False Disciplinary Report*

Franklins claims that Defendant Harmon put a false statement in her disciplinary report. There ordinarily is no right of action against a witness who testifies falsely at trial. In *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983), the Supreme Court held that police officers are absolutely immune from suits for money damages for alleged perjury during criminal trials. In so holding, the Supreme Court stated that private parties who testify in court traditionally have been immune from damages under § 1983. *See id.* at 330-34. Although a prison disciplinary proceeding is not precisely equivalent to a criminal trial, several courts have applied *Briscoe* to bar suits against prison employees who testify falsely at disciplinary hearings. *See, e.g., Thomas v. Calero*, 824 F. Supp. 2d 488, 499 (S.D.N.Y. 2011) (report and recommendation adopted by district court); *McCullon v. Brouse*, Civ. No. 3:10-CV-1541, 2011 WL 1398481, at *8 (M.D. Pa. Mar. 24, 2011)

(report and recommendation), *adopted*, 2011 WL 1419650 (M.D. Pa. Apr. 13, 2011); *Crumbley v. Dawson*, No. 9:09cv14, 2010 WL 2209189, at *5 (E.D. Tex. May 28, 2010); *Gibson v. Roush*, 587 F. Supp. 504, 506 (W.D. Mich. 1984).² Other courts have held that, where a prisoner has received the process that is due, he has no due process claim arising from even false testimony at a disciplinary hearing. *Mitchell v. Senkowski*, 158 F. App'x 346, 349 (2d Cir. 2005) ("The issuance of false misbehavior reports and provision of false testimony against an inmate by corrections officers is insufficient on its own to establish a denial of due process. Rather, such action violates due process only where either procedural protections were denied that would have allowed the inmate to expose the falsity of the evidence against him, or where the fabrication of evidence was motivated by a desire to retaliate for the inmate's exercise of his substantive constitutional rights" (citations omitted)); *see also Crumbley*, 2010 WL 2209189, at *5 ("[T]he prisoner has a right to due process in the proceeding, which process can be provided only by the hearing officer, not by a witness, whether favorable or unfavorable.")

4. *Claims for Failure to Supervise*

Franklin further contends that Defendants Lease DeWalt, Holloway and Schofield failed to properly investigate his grievances. However, the participation of Defendants Lease DeWalt, Holloway and Schofield in processing or denying Franklin's grievances cannot in itself constitute sufficient personal involvement to state a claim of constitutional violation. *Simpson v. Overton*, 79 F. App'x. 117, 2003 WL 22435653 (6th Cir. 2003); *see also Martin v. Harvey*, 14 F. App'x. 307, 2001 WL 669983, at *2 (6th Cir. 2001) ("The denial of the grievance is not the same

² In *Cleavinger v. Saxner*, 474 U.S. 193 (1985), the Supreme Court held that disciplinary committee members were entitled to qualified, rather than absolute, immunity. That decision stressed that hearing officers are not independent and are not akin to professional hearing officers. They are, instead, prison officials and fellow employees of the individuals lodging charges against the inmate. *Id.* at 203-04. That decision did not address the immunity of witnesses at disciplinary hearings.

as the denial of a request to receive medical care.”). Section 1983 liability may not be imposed against a defendant for “a mere failure to act” based upon information contained in a grievance. *See Shehee v. Luttrell*, 199 F.3d at 300; *Lillard*, 76 F.3d at 727-28.

Similarly, Franklin also has no cause of action against these Defendants for failing to investigate or take remedial measures to the extent they were aware of his grievances and complaints. Although failure to investigate may give rise to § 1983 supervisory liability, *see Walker v. Norris*, 917 F.2d 1449, 1457 (6th Cir. 1990) and *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985), the reasoning in *Walker* and the analysis in its progeny teach that evidence of a failure to investigate can establish municipal liability only. In *Dyer v. Casey*, No. 94-5780, 1995 WL 712765, at *2 (6th Cir. Dec. 4, 1995), the Court stated that “the theory underlying [Marchese] is that the municipality’s failure to investigate or discipline amounts to a ‘ratification’ of the officer’s conduct.”

In *Walker*, the Sixth Circuit distinguished *Marchese* because the Court “imposed the broad investigative responsibilities outlined in *Marchese* upon the Sheriff in his official capacity.” *Walker*, 917 F.2d at 1457 (“The Sheriff is sued here in his official capacity and in that capacity, he had a duty to both know and act.”). In 1998, the Sixth Circuit affirmed the dismissal of a claim of supervisory liability based on the “failure to investigate,” stating:

Young’s claim against defendants McAninch and Goff is based solely on their alleged failure to investigate defendant Ward’s behavior towards Young. Although Young stated that defendants McAninch and Goff had knowledge of his allegations against defendant Ward, this is insufficient to meet the standard that they either condoned, encouraged or knowingly acquiesced in the misconduct.

Young v. Ward, No. 97-3043, 1998 WL 384564, at *1 (6th Cir. June 18, 1998).

C. Motion to Issue Summons

On February 22, 2016, Franklin filed a Motion to Issue Summons. (ECF No. 7.) On April 19, 2016, Franklin filed a Motion to Screen the Complaint, Issue Summons and for a Preliminary Injunction. (ECF No. 9.) Because this Order constitutes the screening of the complaint and because Franklin's complaint has been dismissed for failure to state a claim upon which relief can be granted, Franklin's Motions are DENIED as Moot.

III. Standard for Leave to Amend

The Sixth Circuit has held that a district court may allow a prisoner to amend his complaint to avoid a *sua sponte* dismissal under the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also Brown v. R.I.*, No. 12-1403, 2013 WL 646489, at *1 (1st Cir. Feb. 22, 2013) (per curiam) (“Ordinarily, before dismissal for failure to state a claim is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded.”). Leave to amend is not required where a deficiency cannot be cured. *Brown*, 2013 WL 646489, at *1; *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001) (“This does not mean, of course, that every *sua sponte* dismissal entered without prior notice to the plaintiff automatically must be reversed. If it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile, then a *sua sponte* dismissal may stand.”); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002) (“*in forma pauperis* plaintiffs who file complaints subject to dismissal under Rule 12(b)(6) should receive leave to amend unless amendment would be inequitable or futile”); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (“We agree with the majority view that *sua sponte* dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts.”).

IV. Appeal Issues

Pursuant to 28 U.S.C. §1915(a)(3), the Court must also consider whether an appeal by Plaintiff in this case would be taken in good faith. The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the Defendants, but has sufficient merit to support an appeal *in forma pauperis*. See *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

V. Conclusion

The Court DISMISSES Franklin's complaint as to the Defendants for failure to state a claim on which relief can be granted, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Leave to Amend is DENIED because the deficiencies in Franklin's complaint cannot be cured. It is also CERTIFIED, pursuant to 28 U.S.C. §1915(a)(3), that any appeal in this matter by Plaintiff would not be taken in good faith.

The Court must also address the assessment of the \$505 appellate filing fee if Plaintiff nevertheless appeals the dismissal of this case. A certification that an appeal is not taken in good faith does not affect an indigent prisoner plaintiff's ability to take advantage of the installment procedures contained in § 1915(b). See *McGore v. Wrigglesworth*, 114 F.3d 601, 610-11 (6th Cir. 1997), *partially overruled on other grounds by LaFountain*, 716 F.3d at 951. *McGore* sets out specific procedures for implementing the PLRA, 28 U.S.C. § 1915(a)-(b). Therefore, the Plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying

the appellate filing fee, he must comply with the procedures set out in *McGore* and § 1915(a)(2) by filing an updated *in forma pauperis* affidavit and a current, certified copy of his inmate trust account for the six months immediately preceding the filing of the notice of appeal.

For analysis under 28 U.S.C. § 1915(g) of future filings, if any, by Plaintiff, this is the first dismissal of one of his cases as frivolous or for failure to state a claim. This “strike” shall take effect when judgment is entered. *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015).

The Clerk is directed to prepare a judgment.

IT IS SO ORDERED.

s/James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE